

## CALIFORNIA COASTAL COMMISSION

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<b>DOCKET</b> 00-AFC-14C
DATE APR 04 2005
RECD APR 08 2005

April 4, 2005

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APR 4 - 2005

The Honorable Chief Justice Ronald M. George  
California Supreme Court  
350 McAllister Street  
San Francisco, California 94102-3600

CLERK SUPREME COURT

Re: *Amicus Curiae* Letter of California Coastal Commission in Support of Petition for Writ of Mandate of Santa Monica Baykeeper and Heal the Bay  
*Santa Monica Baykeeper v. California Energy Resources Conservation and Development Commission*, California Supreme Court No. S132199

Dear Chief Justice George:

The California Coastal Commission ("Coastal Commission") submits this *amicus curiae* letter in support of the petition for writ of mandate by Santa Monica Baykeeper and Heal the Bay ("petitioners"). The Court should grant review in this matter because the action of the California Energy Resources Conservation and Development Commission ("Energy Commission") raises important questions that require judicial resolution. The question of particular concern to the Coastal Commission is: May the Energy Commission effectively disregard Coastal Commission determinations regarding the measures necessary to ensure that thermal power plant projects in the State's coastal zone meet the objectives of the California Coastal Act?

## INTERESTS OF AMICUS CURIAE CALIFORNIA COASTAL COMMISSION

The Coastal Act establishes that the basic goals of the State for the coastal zone include protection and enhancement of the coastal zone environment; orderly, balanced utilization and conservation of coastal zone resources; and assurance of priority for coastal-dependent development over other development on the coast. (Pub. Resources Code, § 30001.5.) The Coastal Commission has the primary responsibility for accomplishing these objectives. (*Id.*, § 30330.) All other state agencies must carry out their responsibilities in conformity with the Coastal Act. (*Id.*, §§ 30003, 30402.)

The Warren-Alquist State Energy Resources Conservation and Development Act, Pub. Resources Code, § 25000 *et seq.* ("Warren-Alquist Act"), exempts thermal power plant projects from the permitting requirements of the Coastal Act, but includes numerous provisions to ensure that thermal power plant projects in the coastal zone are consistent with the objectives of the Coastal Act. (*Id.*, § 25500; *see, e.g., id.*, §§ 25507, subd. (a), 25508, 25514, subd. (b), 25516.1, 25519, subd. (d), 25523, subd. (b), 25526, subd. (a).) The Coastal Act, in turn, requires the

Coastal Commission to participate in Energy Commission proceedings regarding thermal power plant projects in the coastal zone. (*Id.*, § 30413, subd. (d).)<sup>1</sup> The Energy Commission must require any "specific provisions" identified by the Coastal Commission as necessary to accomplish the objectives of the Coastal Act unless it specifically finds that those provisions are infeasible or would result in greater adverse effect on the environment. (*Id.*, § 25523, subd. (b).) If the Energy Commission rejects the Coastal Commission's specific provisions, the Energy Commission must consult with the Coastal Commission to attempt to correct the noncompliance with the Coastal Act resulting from failure to incorporate the provisions. If the consultation does not resolve the conflict, the Energy Commission must adopt findings that the project is necessary for public convenience and necessity and that there are not more prudent and feasible means of achieving that public convenience and necessity. (*Id.*, §§ 25523, subd. (d)(1), 25525.)

Coastal Commission staff participated extensively in the Energy Commission proceedings regarding the El Segundo Power Redevelopment Project and the Coastal Commission formally adopted recommendations regarding specific provisions necessary to ensure that the project accomplished the objectives of the Coastal Act. The Energy Commission refused to incorporate either of the Coastal Commission's two alternative specific provisions regarding protection of marine resources. The Coastal Commission believes that Energy Commission did not proceed in the manner required by law when it rejected the Coastal Commission's specific provisions. The Coastal Commission has a strong interest in judicial resolution of the issue of how the Energy Commission incorporates Coastal Commission recommendations into its review of thermal power plant projects. The Coastal Commission therefore voted to authorize the submittal of an *amicus curiae* letter in support of the petition.

#### ENERGY COMMISSION APPROVAL OF EL SEGUNDO POWER REDEVELOPMENT PROJECT

On December 21, 2000, real party in interest El Segundo Power II LLC ("applicant") submitted an application for certification of a project to replace two of the generators at its thermal power plant located in El Segundo, Los Angeles County. The proposal called for demolition and reconstruction of on-shore generating facilities, but avoided changing the decades-old infrastructure for the intake and discharge of cooling water. Like the Energy Commission staff and a number of other federal and state agencies including the National Marine Fisheries Service, the California Department of Fish and Game, and the State Lands Commission, Coastal Commission staff urged the Energy Commission to require the applicant to conduct a study evaluating the entrainment and impingement<sup>2</sup> effects of the cooling water demand of the proposed facilities. Although the Energy Commission has routinely required such studies in

<sup>1</sup> The Coastal Commission may participate in proceedings regarding other thermal power plant projects, for example, projects located outside the coastal zone that may affect the coastal zone. (*Id.*, § 30413, subd. (e).)

<sup>2</sup> Entrainment occurs when small marine organisms are pulled into the cooling system and killed by heat or other effects of the system. Impingement occurs when larger marine organisms are trapped against screens within the intake.

other thermal power plant projects located along the coast, it refused to require an entrainment study in this instance. It instead decided that older studies regarding the effects of other power plants on the marine environment would be sufficient.

In its formal comments to the Energy Commission, the Coastal Commission identified two alternative approaches to ensure that the project complied with the Coastal Act's marine protection policies. First, the applicant should use the nearby City of Los Angeles Hyperion Treatment Plant ("Hyperion alternative"), rather than the ocean, as a source of cooling water. This approach would avoid all entrainment and impingement of marine life. Second, if it decided not to require the applicant to adopt the Hyperion alternative, the Energy Commission should require the applicant to conduct a study evaluating the impacts of the proposed project on marine life ("entrainment study") and use that study as the basis for determining what mitigation or project modifications to require.

Despite the requirement of Public Resources Code section 25523, subdivision (b), that the Energy Commission incorporate any specific provisions identified by the Coastal Commission as necessary to accomplish the objectives of the Coastal Act, the Energy Commission initially rejected the Coastal Commission's specific provisions on the ground that the Energy Commission disagreed with the Coastal Commission's position that a project-specific entrainment study would be necessary in order to evaluate the conformity of the project with Coastal Act requirements and the California Environmental Quality Act ("CEQA").

Ultimately, in response to repeated comments by Energy Commission staff, the Coastal Commission, and petitioners that the Energy Commission did not have legal authority to reject Coastal Commission recommendations simply on the basis that the Energy Commission disagreed with the Coastal Commission's Coastal Act analysis, the Energy Commission adopted additional findings to comply with Public Resources Code sections 25523 and 25525. First, the Energy Commission found that the Hyperion alternative was infeasible and that the pre-approval entrainment study recommended by the Coastal Commission would cause greater adverse environmental effects than the Energy Commission's preferred approach of requiring the applicant to fund a post-approval study of the marine environment in Santa Monica Bay as a whole. Second, the Energy Commission adopted findings that the public convenience and necessity required approval of the project and that there was no more prudent, feasible means of achieving the public convenience and necessity. The Energy Commission did not consult with the Coastal Commission regarding adoption of the findings of public convenience and necessity.<sup>3</sup>

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<sup>3</sup> The Energy Commission in its Statement of Opposition asserts that the Coastal Commission conceded that a meeting between the Energy Commission and Coastal Commission was unnecessary. This is incorrect. The Coastal Commission's letter of January 19, 2005, noted that a meeting between Coastal Commission staff and Energy Commission *staff* would serve no purpose because Energy Commission staff agreed with the Coastal Commission. The Coastal Commission's disagreement was with the Energy Commission itself. The letter expressly requested a meeting between the two commissions to attempt to resolve their differences.

## REASONS FOR GRANTING REVIEW

### A. The Energy Commission Upset The Balance Between Economic and Environmental Concerns Struck In The Warren-Alquist Act By Disregarding The Coastal Commission's Recommendations.

The Warren-Alquist Act balances the State's compelling interests in protection of coastal resources and efficient review of energy projects. It assigns ultimate regulatory authority over thermal power plant projects for state law purposes to the Energy Commission while requiring the Energy Commission to defer to the Coastal Commission's analysis of what measures are necessary to ensure that thermal power plant projects located in the State's coastal zone accomplish the objectives of the Coastal Act. (Pub. Resources Code, §§ 25523, subd. (b), 30413, subd. (d).)<sup>4</sup> The Energy Commission may reject the specific provisions identified by the Coastal Commission only if those provisions are either infeasible or would result in greater adverse effects on the environment. (*Id.*, § 25523, subd. (b).) Because rejection of specific provisions necessary to accomplish the objectives of the Coastal Act necessarily renders a project inconsistent with the Coastal Act, in such situations the Energy Commission must also adopt findings of public necessity and convenience. (*Id.*, §§ 25523, subd. (d)(1), 25525.) The Energy Commission's findings in this matter are so legally flawed that they support only one inference: that the Energy Commission does not regard itself as owing any deference to the Coastal Commission's Coastal Act analysis of thermal power plant projects located in the coastal zone. This upsets the careful balance the Legislature struck when melding Energy Commission and Coastal Commission review of thermal power plant projects in the coastal zone.

### B. The Energy Commission's Stated Reason For Refusing To Require Pre-Approval Entrainment Study Is Implausible And Lacks Any Basis In The Record.

The Energy Commission rejected the Coastal Commission's recommendation that it require a pre-approval entrainment study on the ground that such a study would result in greater adverse effect on the environment than the more general post-approval study of the Santa Monica Bay that the Energy Commission required. The Energy Commission's conclusions on this point are implausible and lack any basis in the record. The entrainment study recommended by the Coastal Commission would identify the nature and extent of the impacts of the proposed project on the marine environment and would provide a sound basis for determining the appropriate mitigation to redress the adverse effects of the project on ocean life. Although the post-approval study of Santa Monica Bay that the Energy Commission required the applicant to fund may be a worthy endeavour, the Energy Commission did not establish mechanisms to require that any of the recommendations of that study actually be carried out. The Energy Commission speculated that the Los Angeles Regional Water Quality Control Board ("Regional Board") might use the

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<sup>4</sup> A similar set of requirements applies to the Energy Commission and the San Francisco Bay Conservation and Development Commission ("BCDC") with respect to review of thermal power plant projects within BCDC's jurisdiction. (*See* Pub. Resources Code, § 25523, subd. (c), Gov. Code, § 66645, subd. (d).)

study in the course of its federal Clean Water Act review of the project, but nothing about the Energy Commission's action ensures that that will actually happen.

The Energy Commission's assertion that a pre-approval entrainment study to determine appropriate mitigation would cause greater adverse effects on the environment than a post-approval study that will not necessarily result in any mitigation whatsoever is so lacking in any plausibility that only one conclusion is possible. The Energy Commission felt compelled to acknowledge the requirements of Public Resources Code section 25523, subdivision (b), but only to the extent that those requirements do not interfere with the Energy Commission's own policy preferences. The Warren-Alquist Act, however, does not authorize the Energy Commission to disregard the Coastal Commission's specific provisions for policy reasons other than those identified in the statute.

**C. The Energy Commission's Refusal To Require Pre-Approval Entrainment Study Rested On Legally Flawed Interpretation Of The Coastal Act's Marine Protection Policies.**

The Energy Commission further rationalized its rejection of the Coastal Commission's recommendations by contending that its approach was fully consistent with Coastal Act requirements. As explained above, the Warren-Alquist Act does not authorize the Energy Commission to reject specific provisions simply because the Energy Commission disagrees with the Coastal Commission's Coastal Act analysis. Moreover, the Energy Commission's selective interpretation of the Coastal Act's marine protection policies is legally flawed in multiple respects.

The Energy Commission held as a matter of law that, because the proposed new generators would not use more ocean water than the old generators, the requirements of Public Resources Code sections 30230 and 30231 that the marine environment be "maintained" were satisfied. The Energy Commission could reach this conclusion only by ignoring the plain language of the Coastal Act.

Section 30230 requires marine resources to be "maintained, enhanced, and where feasible, restored." The Energy Commission entirely ignored the section's further elaboration on what this means: "Uses of the marine environment shall be carried out in a manner that will *sustain the biological productivity* of coastal waters and that will *maintain healthy populations* of all species of marine organisms adequate for long-term commercial, recreation, scientific, and educational purposes." (Emphasis added.) Section 30231 further provides that "[t]he biological productivity and quality of coastal waters . . . appropriate to *maintain optimum populations* of marine organisms . . . shall be maintained and, where feasible, restored through, among other means, *minimizing adverse effects of . . . entrainment . . .*" (Emphasis added.)

Contrary to the Energy Commission's interpretation, the Coastal Act's requirements regarding maintaining the marine environment do not focus on maintaining current or previous disturbances of the marine environment, e.g., the power plant's previous rates of consuming ocean water. Rather, they focus on maintaining the health of the marine environment. Because it did not have, and refused to require, current information about the effects of resumed

consumption of ocean water on the health of the marine environment, the Energy Commission was in no position to evaluate the conformity of the project with Coastal Act requirements, much less conclude as a matter of law that the project complied with them.

The Energy Commission did acknowledge that the Coastal Act also requires that marine resources be enhanced and, where feasible, restored. Its conclusion that a general, post-approval study of Santa Monica Bay would satisfy these requirements, however, is baseless. As explained above, the Energy Commission did not require the recommendations of that study to be implemented. Absent a mechanism to ensure that the study results in actual improvements to the marine environment, it in no way complies with the requirements of the Coastal Act to enhance and, where feasible, restore the marine environment.

**D. The Energy Commission Improperly Adopted Findings Of Public Convenience And Necessity Without Knowledge Of The Likely Effects Of The Project On The Marine Environment.**

Recognizing that its rejection of the Coastal Commission's specific provisions supported arguments that the project did not comply with Coastal Act requirements, the Energy Commission adopted alternative findings that the project is required for public convenience and necessity and that there are not more prudent and feasible means of achieving that public convenience and necessity. (See Pub. Resources Code, §§ 25523, subd. (d)(1), 25525.) Again, these findings lack any basis in the record. The Energy Commission has routinely required entrainment studies in connection with previous reviews of thermal power plants located in the coastal zone. Nothing in the record indicates that performing such a study would be in any way infeasible.

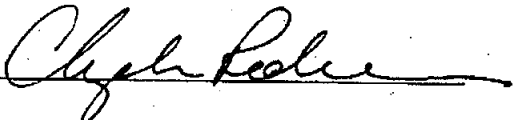
Moreover, in the absence of current and reliable information about the likely effects of the project on the marine environment and how those effects could be mitigated, the Energy Commission was in no position to determine that there were no more prudent and feasible means of achieving public convenience and necessity than the version of the project approved by the Energy Commission. In the absence of the most basic information about the effects of the project on the marine environment, the Energy Commission could no more appropriately adopt findings of public convenience and necessity than could a public agency conducting CEQA review adopt a statement of overriding considerations to approve a project with significant adverse effects on the environment without first fully evaluating those effects and considering feasible alternatives and mitigation. (See Pub. Resources Code, § 21002.1.)

### CONCLUSION

The Energy Commission's errors of law demonstrate that the Energy Commission in fact interprets the Warren-Alquist Act as authorizing it to disregard the Coastal Commission's recommendations regarding thermal power plant projects when it disagrees with the Coastal Commission's recommendations for policy reasons that are not authorized by statute. The Coastal Commission, in contrast, believes that the Warren-Alquist Act requires the Energy Commission to give force and effect to Coastal Commission recommendations except in circumstances that are precisely defined by statute. For the reasons stated in this letter and in the petition for writ of mandate, the Coastal Commission therefore respectfully requests the Court to grant review of this important matter.

Respectfully submitted,

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By   
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**DECLARATION OF SERVICE**

Case Name: *Santa Monica Baykeeper v. California Energy Resources Conservation and Development Commission*

California Supreme Court Civil No. S132199

I declare:

I am employed by the California Coastal Commission, which is an agency of the State of California. I am over the age of 18 and not a party to this matter, my business address is: 45 Fremont Street, Suite 2000, San Francisco, County of San Francisco, California 94105-2219.

I am familiar with the business practice at the California Coastal Commission for collection and processing of correspondence for mailing through the United States Postal Service. In accordance with that practice, correspondence placed in the internal mail collection system at the California Coastal Commission is deposited with the United States Postal Service at the Post Office that same day in the ordinary course of business.

On April 4, 2005, I served the attached *Amicus Curiae* Letter of California Coastal Commission in Support of Petition for Writ of Mandate of Santa Monica Baykeeper and Heal the Bay by placing a true copy thereof enclosed in a sealed envelope with postage thereon fully prepaid, in the internal mail collection system at the California Coastal Commission, addressed as follows:

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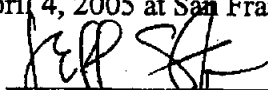
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I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct and that this declaration was executed on April 4, 2005 at San Francisco, California.

JEFF STABEN  
TYPED NAME

  
Signature